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Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-6

HILMAR G. MOORE, RAUL JIMENEZ AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,
Appellants

v.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,
Appellees

On Appeal from the United States District Court For The Southern District Of Texas Houston Division

APPELLEES' BRIEF

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APPELLEES' BRIEF

To The Honorable Justices of the Supreme Court of the United States:

Appellee John Pleasant Sims, et al, respectfully submit this their Brief on the merits.

OPINION BELOW

The opinion of the Three-Judge District Court for the Southern District of Texas, Houston Division is reproduced in Volume I of the Appendix, page 61 and is reported at 438 F. Supp. 1179 (S.D. Tex. 1977).

JURISDICTION

Jurisdiction was invoked pursuant to the provisions of 42 U.S.C. § 1983; 28 U.S.C. §§ 1331, 2201, 2281, 2284; and the following provisions of the United States Constitution: Article I, Section 9 and the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments.

STATUTES INVOLVED

The statutes applicable, with the exception of those stated below are set out in Appendix I, Volume II, P. A-131 and Appendix J., Volume II, A-182 of Appellants' Jurisdictional Statement.

ADDITIONAL STATUTES INVOLVED

Chapter 11, sections 11.06 and 11.09; Chapter 17, section 17.01 and Chapter 34, section 34.08 of the Texas Family Code (1975).

QUESTIONS PRESENTED

I.

WHETHER OR NOT ABSTENTION IS PROPER IN THIS CASE.

II.

WHETHER OR NOT THIS ACTION PRESENTS A CASE OR CONTROVERSY.

III.

WHETHER OR NOT SECTIONS 11.10 AND 11.15 OF CHAPTER 11 AND SECTIONS 17.02, 17.03, 17.05 AND 17.06 OF CHAPTER 17 AND SECTIONS 34.05 (c) AND 34.08 OF CHAPTER 34 OF TITLE TWO OF THE TEXAS FAMILY CODE ARE UNCONSTITUTIONAL ON THEIR FACE.

IV.

WHETHER OR NOT SECTIONS 11.11(a) (4) OF CHAPTER 11 USED IN CONJUNCTION WITH CHAPTER 17 OF TITLE TWO OF THE TEXAS FAMILY CODE ARE UNCONSTITUTIONAL AS APPLIED.

STATEMENT OF THE CASE

John Pleasant and Mary Carter Sims are adult Appellees in this case. Minor Appellee Sabrina Marie Sims is the natural child of the adult Appellees. Minor Appellees Paul Edward Sims and Shawana Evette Sims were adopted through Harris County Child Welfare by the adult Appellees. In March, 1976, the Sims children resided with their parents in Montgomery County, Texas, and attended school in Houston, Harris County, Texas.

On March 25, 1976, in response to a telephone referral alleging child abuse made by school personnel regarding only Paul, Child Welfare agent and employee, caseworker Rex Downing went to the school. Shortly after 1:30 P.M., he took possession and control without a court order, of not just Paul but the two other Sims children as well, and then transported all three to the

Child Welfare Clinic where they were examined by Dr. Marie L. Surgi over the express objections of adult Appellees. The minor Appellees were never delivered to any court.

On March 26, 1976, at 4:54 P.M. Betsy C. Connor (a Welfare court representative who is not an attorney) filed a Suit For Protection Of Child In Emergency pursuant to provisions of Chapter 17, Title 2, Texas Family Code which was docketed under Cause No. 38,295 in the Juvenile Court Number One (1) of Harris County, Texas, and in which all three minor Appellees were made subjects of the suit. No names or places of residence of the parents or persons responsible for the care of the three minors appeared at any place in the petition although the Petitioner therein requested "that citation and notice be issued to all persons named." On the same day, Judge Robert L. Lowry of the Harris County Juvenile Court Number One (1) entered an Ex Parte Order by the terms of which Child Welfare was made temporary managing conservator of the three minor Appellees.

On March 31, 1976, counsel for the adult Appellees filed a Motion To Modify Temporary Orders For Emergency Protection Of Child with attached proposed Order Modifying Temporary Orders. Both instruments were stamped "Received" and "JUV" by the Clerk of the Juvenile Court but were returned to counsel by the Clerk who had been instructed not to set a hearing. On the same day counsel for adult Appellees also filed a Petition for Writ of Habeas Corpus seeking return of the three minor Appellees, which suit was docketed as Cause No. 1,069,341 in Juvenile Court and upon which a hearing was set for April 5, 1976, at 10:30 A.M.

Adult Appellees caused notice of the filing of their Petition for Writ of Habeas Corpus and of the hearing set thereon to be served upon Harris County Child Welfare and also issued subpoenas for attendance of witnesses.

On April 5, 1976, at the hearing on the Petition for Writ of Habeas Corpus, Judge Lowry determined that all of the Appellees were residents of Montgomery County, Texas. Upon such determination and without receiving evidence, the Court ruled it did not have power to hear the habeas corpus proceeding although Judge Lowry had personal knowledge that the three minor Appellees were restrained in Harris County, Texas by virtue of the terms of his own Ex Parte Order entered March 26, 1976. The case was then transferred to Montgomery County, however, the minor Appellees remained in Harris County and in the possession of Harris County Child Welfare. The second cause filed by Harris County Child Welfare was also transferred to Montgomery County. On the same day, at 4:47 P.M., Ms. Connor filed a second suit in Cause No. 38,295 on the docket of the Harris County Juvenile Court Number One (1), entitled Original Petition In Suit Affecting Parent-Child Relationship.

Subsequent to the filing of the Original Petition, Judge Lowry entered a second Ex Parte Order continuing temporary managing conservatorship of the three minor Appellees in Harris County Child Welfare. This second Ex Parte Order, setting both temporary and final hearings in the second suit, shows them both to be set for "the ____ day of _____, 19____ at _____ o'clock ___.M." and appoints "An attorney _____ . . .

to serve as guardian ad litem and represent the minor child(ren) at all hearings. . . ."

On May 4, 1976, still seeking return of their children, adult Appellees filed an Application For Leave To File Writ Of Habeas Corpus in the Court of Civil Appeals, 14th Supreme Judicial District of Texas, sitting at Houston. Such Application was denied by the Court for lack of jurisdiction on May 4, 1976. On May 5, 1976, at a hearing before the Federal District Court, there was testimony adduced that the blanks appearing in the Order had never been filled in. The transferred cases were received and docketed (Cause No. 3,030) in Montgomery County on April 6, 1976. No hearing of any kind was ever held by the Montgomery County Court. The three children remained in the possession and control of Harris County.

The first hearing afforded Appellees after seizure of the three minors on March 25, 1976, was that of May 5, 1976, before the Honorable John V. Singleton, Jr. who ordered the return of three minor Appellees to the adult Appellees on May 14, 1976. Nine days after the Federal District Court ordered return of the minor Appellees, a third suit was filed by the Appellants as an Original Petition In Suit Affecting The Parent-Child Relationship (docketed as Cause No. 3,090) in the Juvenile Court of Montgomery County, Texas. The suit filed in Montgomery County on May 14, 1976, pertained only to the minor Appellee Paul Edward Sims. On the same day, Ernest L. Coker, Sr., Judge of the Juvenile Court of Montgomery County, Texas, issued an Ex Parte Writ of Attachment for Paul Edward Sims. A hearing was set for May 21, 1976.

On May 21, 1976, counsel for Appellees made application to the Federal District Court for a Temporary Restraining Order, which was granted by Judge Singleton. The Three Judge Court issued a Preliminary Injunction, restraining and enjoining Appellants from filing or prosecuting any action in State Court based upon the State statutes that were unconstitutional. The Three Judge Court found "irreparable harm and injury to Appellees: 1) by the very fact that in the initial proceeding initiated by the State the Appellees' family unit was disrupted for a total of forty-two (42) days without any type of relief afforded to Appellees; and 2) if the Appellants were allowed to initiate further proceedings Appellees would be placed in a similar situation as they had been prior to obtaining Federal Court relief."[1]

The names of the Appellees now appear as "perpetrators" and/or victims of child abuse in a central registry maintained by the Texas State Department of Public Welfare in Austin, Texas, by two separate incidents: March 25, 1976 (date of initial seizure of the three minor Appellees) and May 5, 1976 (the date on which minor Appellees were ordered restored to adult Appellees by this Court), although no judicial finding of any such abuse has been made. Information gathered by Harris County Child Welfare in the course of adoption of the minor Appellees Paul Edward Sims and Shawana Evette Sims by the adult Appellees in 1974 and 1975 was not retired and sealed following such adoptions. In fact and instead, such information was referred to and used by such Agency and also transmitted to the Montgomery County Agency of the Department during the time of

1. Order of Preliminary Injunction entered June 18, 1976.

their seizure, possession and control of the minor Appellees.

Dorothy Mae Woods, et al. (76-H-1120) was consolidated by Court Order with the Sims case on July 16, 1976. The Plaintiffs in the Woods case were Dorothy Mae Woods and her minor child Rebecca E. Woods.

The following is a chronology of the Woods case.

(1) The Woods originally filed this cause seeking to restrain the enforcement, operation and execution of Title 2, Chapters 11, 15 and 17 of the Texas Family Code and other discriminatory and arbitrary practices on the part of the State which violated rights guaranteed by the Fourteenth (14th) Amendment of the United States Constitution.

(2) Dorothy Mae and Rebecca E. Woods had been receiving supportive service through the State Department of Human Resources prior to January 21, 1976.

(3) On January 21, 1976, Judy Albracht, an employee (Social Worker) of the State Department picked Rebecca E. Woods up from Nursery School without notice to Dorothy Mae Woods. The Social Worker left only a hand written note on the door of Rebecca Woods' residence. The note was dated January 21, 1976, 4:00 o'clock P.M., and stated:

> "Mrs. Woods: Harris County Child Welfare has picked up your daughter, Becky, and she is now in a foster home. I need to talk to you about this—call me as soon as possible."

It was signed by Judy Albracht.

(4) On the same day, employees of the State Department of Human Resources obtained a Temporary Order from Criss Cole, Judge of Juvenile Court Number Three (3) in and for Harris County, Texas. The order appointed the director of Harris County Child Welfare as temporary managing conservator of Rebecca E. Woods. The order was obtained without presenting the child to a Judge and without the existence of an emergency as required by Title 2, Section 17.01 of the Texas Family Code. Judge Cole set February 2, 1976, as the date for a show cause hearing to determine temporary custody pending final hearing on termination of parental rights.

(5) Dorothy Mae Woods received a telephone call from one of the Department's employees and was told the date and time of the show cause hearing. She was not served with process.

(6) The show cause hearing was held on February 2, 1976, and the Petitioner was given temporary custody and appointed temporary managing conservator of the minor child. Dorothy Mae Woods was present, however. she was not represented by counsel.

(7) The final hearing was set for April 8, 1976, however, the case was not heard until April 29, 1976.

(8) Dorothy Mae Woods' parental rights were terminated by Judge Cole on April 30, 1976; Harris County Child Welfare was appointed managing conservator and that attorney ad litem was awarded two hundred ($200.-00) dollars. Mrs. Woods was present and represented at the final hearing by Nicholas Serna, Esq., Gulf Coast Legal Foundation. The following events occurred:

May 20, 1976—A motion for a new trial was heard and denied.

May 26, 1976—Hearing, Order on Pauper's Oath signed.

May 28, 1976—Motion to Suspend the Trial Court's judgment pending appeal was denied; Ray Hardy's District Clerk's contest to Pauper's Oath overruled and Pauper's Oath sustained. An Order was signed on that date.

June 24, 1976—Finding of facts was signed.

July 2, 1976—Mrs. Woods complaint was filed with the Court (Federal District Court).

July 2, 1976—Motion to Maintain Class action and affidavit in support thereof was filed.

July 15, 1976—A transcript of the Juvenile Court's proceedings was filed with the Court of Civil Appeals First Supreme Judicial District of Texas at Houston, Texas.

July 16, 1976—Court's Order granted Mrs. Woods' attorney's leave to file Motion to Consolidate—Cause was consolidated with SIMS # 76-H-665 District Court of Texas at Houston, Texas.

July 21, 1976—The Statement of Facts was filed with the Court of Civil Appeals.

August 18, 1976—Mrs. Woods' et al's brief was filed with the Court of Civil Appeals.

October 14, 1976—Woods' Motion to Stay Proceedings in Federal Court was filed.

November 8, 1976—The above motion was granted by the Court.

(9) On December 8, 1976, the Texas Court of Civil Appeals reversed and remanded the Juvenile Court's

Order which terminated the parent-child relations (*In Re: R.E.W.*, 545 S.W.2d 573 (C.A. 1976) in an opinion filed by Associate Justice Evans. The issue of the right of indigent persons to have Court appointed counsel in proceedings affecting the parent-child relationship was not dealt with by the above Court.

January 13, 1977—A Motion for Rehearing was filed by Appellee State Department et al. That motion was denied.

February 23, 1977—Woods' Petition for Writ of Error was filed with the Court of Civil Appeals.

May 11, 1977—The Texas Supreme Court refused Writs of Error, N.R.E.

May 25, 1977—The parties reached a settlement by way of a Return Home Agreement between Harris County Child Welfare and Dorothy Mae Woods. The agreement expired on November 30, 1977.

July 26, 1977—The Court of Civil Appeals issued its mandate. The mandate was forwarded to Ray Hardy, District Clerk, Harris County, Texas.

July 29, 1977—Rebecca E. Woods was returned to Dorothy Mae Woods.

(10) On August 17, 1977, an agreed Motion to Dismiss the cause and to receive all prior orders of the Juvenile Court terminating the parental rights of Mrs. Woods, et al. was granted by the Juvenile Court.

February 27, 1978, Judgment was rendered on SIMS; the order in that cause expressly states "That this Court's consolidation of the issue of the right of indigent parents to have counsel was ill advised, but that issue shall re-

main pending in Civil Action Number 76-H-1120, before another Judge of this Court" (this case).

(11) The right of indigent persons to have court appointed counsel in proceedings affecting the parent-child relationship is being litigated at this point.

It should be noted that Harris County Child Welfare has caused another petition to terminate the parental rights of Dorothy Mae Woods to be filed.

SUMMARY OF ARGUMENT

I

The case before the court presents a situation involving a family composed of two parents and three children whose fundamental rights were denied and violated by an unwarranted and unjustified intrusion by the State. The parent-child relationship is very delicate. Consequently, any intrusion into the relationship is at the very least disruptive and can be traumatic. The Sims family unit was disrupted by the State for a period of forty-two (42) days without notice and a hearing. Abstention would not be proper in this case. This action does present a case and controversy, further that the statutes involved are either unconstitutional on their face or as applied.

The case at hand is an exception to the abstention doctrine. This case could not have been disposed of on questions of state law. There was no conflict with the administration by a state with its own affairs. This was not an instance where there were unsettled questions of state law for the Court to resolve. Appellees had no

adequate remedy at law and would have suffered great and irreparable harm if equitable jurisdiction had been denied. The statutes challenged were found to be both "flagrantly and patently violative of federal constitutional requirements."

Equitable relief was proper and this cause does present a case and controversy. Equitable relief was further proper in that there was both an adequate showing of responsibility and causal connection between Appellants' contact and the injury alleged from the time that Appellants summarily seized the minor Appellees until relief was granted by the Federal District Court in its decision of October, 1977. Appellants' conduct in this case is truly capable of repetition yet paradoxically may evade review. To say that this cause should not be litigated simply because the Federal Court returned the children during the pendency of this cause would be a way in which the state could evade review of constitutional infringements within this area of family law.

In addition, Section 11.10 and 11.15 of Chapter 11 and Sections 17.02, 17.03, 17.05 and 17.06 of Chapter 17 and Sections 34.05(c) and 34.08 of Chapter 34 of Title Two of the Texas Family Code are unconstitutional on their face. Section 11.11(a)(4) of Chapter 11 used in conjunction with Chapter 17 of Title Two of the Texas Family Code are unconstitutional as applied.

The issues in this case not only involve possession of the children, but the denial of due process, unconstitutionality of the State statutes, deprivation of constitutional rights under the color of law, the integrity of the family unit, the interest of the parties and the right to privacy.

ARGUMENT

I

ABSTENTION WOULD NOT BE PROPER IN THIS CASE

The circumstances in this cause are such that abstention would not be proper. The *facts* of this case dictate federal intervention as it constitutes an exception to the principles of the abstention doctrines. Abstention originated upon the theory that the State and Federal Courts have separate functions. "The concept of federalism or comity represents a system in which there is sensitivity to the legitimate interest of both state and national governments . . . ," *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Younger v. Harris,* 401 U.S. 37 (1971). Where abstention is involved, a Federal Court will usually defer to a State to allow the State Court the opportunity to rule on state law policy, however, this Court has recognized circumstances where the usual abstention doctrines do not apply.

In *Younger v. Harris,* (supra), hereinafter referred to as *Younger* or *Younger Doctrine,* this Court held that abstention is appropriate where, absent bad faith, harrassment or a patently invalid state statute, federal jurisdiction is invoked for the purpose of restraining state criminal proceedings. The *Younger Doctrine* was first extended to a civil case in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), a case involving a pending state civil nuisance proceeding antecedent to a criminal prosecution.

To meet the *Younger* test the federal plaintiff must show the following:

A. MANIFEST BAD FAITH

In the case at hand, the state first instituted a suit affecting the parent-child relationship in Houston, Harris County, Texas. The children were taken into custody on March 25, 1976. An Ex Parte Order was issued by Robert L. Lowry, sitting as Judge of Juvenile Court Number One (1), in and for Harris County, Texas. The Ex Parte Order, which was issued pursuant to Chapter 17, Sections 17.04 and 17.05, of the Texas Family Code (1975) gave temporary custody to Harris County Child Welfare.

The following circumstances constitute manifest bad faith: The parents were not notified as to the whereabouts of their children. They were not accorded a hearing even though the temporary order expired ten (10) days after the filing of the original petition, according to Chapter 17, Section 17.05(a), of the Texas Family Code (1975), which states that "an order issued under Section 17.04 of this code expires at the end of the ten (10) day period following the date of the order . . .".

On March 31, 1976, the parents sought to present to Judge Lowry a Motion for Modification of the March 26, 1976, Ex Parte Order, which removed the children from the custody of their parents. The Motion to Modify was not heard by the Court, even though Section 17.06 of the Texas Family Code states that the court shall conduct a hearing on the motion of a parent, managing conservator or guardian. The parties appeared, however, the judge was not present. In fact, the Judge's clerk refused to allow Appellees' attorney to file the motion. The motion was returned to the parents' attorney. The parents were effectively denied access to the Court.

A hearing on a Writ of Habeas Corpus was held April 5, 1976. That was the first and only opportunity afforded the parents to appear before the Court. On that same date, Judge Lowry, of Harris County, Texas, issued an Ex Parte Order for Montgomery County, Texas, pursuant to Chapter 11 Section 11.11 of the Texas Family Code (1975). The Judge's Order setting the hearing in Montgomery County was entered in blank and still remains blank. A petition was not filed in Montgomery County until May 14, 1976. That petition involved only Paul Sims, one of the minor children. The parents were not given notice, nor was citation or process of any kind served upon them, although required by Chapter 11, Section 11.09 of the Texas Family Code (1975)[2]. The Sims were not afforded a hearing in Montgomery County. During the entire forty-two (42) day period, the children remained in the custody of the Harris County Child Welfare Unit.

Harris County Child Welfare showed bad faith in filing a second petition seeking Ex Parte relief in Harris County

2. "SECTION 11.09
Citation and Notice
(a) Except as provided in Subsection (b) of this section, the following persons are entitled to service of citation on the filing of a petition in a suit affecting the parent-child relationship:
(1) The managing conservator, if any;
(2) possessory conservators, if any;
(3) person, if any, having access to the child under an order of the court;
(4) persons, if any, required by law or by order of a court to provide for the support of a child;
(5) the guardian of the person of the child, if any;
(6) the guardian of the estate of the child, if any;
(7) each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Section 15.08(c)(2) of this code. . . ."

after being present at the hearing where Judge Lowry refused to hear the Sims' Writ of Habeas Corpus because of lack of jurisdiction.

B. INJURY THAT IS GREAT, IMMEDIATE, AND IRREPARABLE, CONSTITUTING HARASSMENT

The Sims and their children suffered both actual and the threat of great, immediate and irreparable injury.

1. Actual Injury

(a) The interest sought to be protected by the state in this instance does not warrant the infringement of Appellees' rights of family unity, due process, integrity, privacy and mutual association which are guaranteed by the United States Constitution. The right to a familial relationship was unjustifiably interferred with by the state in that the Sims family was separated for forty-two (42) days. This unwarranted, prolonged separation has caused great, immediate and irreparable damage to the family unit. This Court has long recognized the fundamental rights of family relationship and integrity and has sought to protect that relationship, *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guaranty and Liability Insurance Co.*, 391 U.S. 72 (1968); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 231 U.S. 158 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *May v. Anderson*, 345 U.S. 528 (1953).

(b) Chapter 17, section 17.01 of Title Two (2) of the Texas Family Code (1975) which deals with taking possession of children in an emergency states that "an

authorized representative of the state Department of Public Welfare, a law enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle, whether or not the court has continuing jurisdiction under 11.05 of this code." The foregoing section was relied upon by Appellants when they took custody of the children on March 25, 1976. There was no justification for Appellants' actions which perpetuated the irreparable injury suffered by the family in denying it due process. Section 17.01 is still in effect and can be used in emergency situations.

(c) The accumulation and dissemination of information regarding the family as recorded in The Child Abuse and Neglect Report and Inquiry System hereinafter referred to as CANRIS constitutes an actual injury suffered. The Sims had no means of challenging or correcting the information stored in the computerized banks. Such information recorded with no opportunity to be challenged or corrected not only constituted an invasion of privacy but also a denial of due process.

(d) The Sims family suffered irreparable harm in that they were not given notice, served with process, or accorded a hearing.

(e) The Sims were faced with suits pending in both Harris and Montgomery Counties. The duplicity of suits caused irreparable injury in that they denied the Sims a meaningful forum for litigation.

(f) Paul, Shawana and Sabrina Sims, the children, suffered irreparable injury in that the State did not re-

quire an appointment of an attorney to protect their interests which are separate and apart from those of the parents and the state. This Court has recognized the need for protection of fundamental rights of minors from the beginning of the judicial process; *In Re: Gault,* 387 U.S. 1 (1967). The children were separated from their family and from each other, and put in foster care facilities by the state, without benefit of an attorney to represent their interests. Although, the Court maintained custody of the children, denied a modification hearing requested by the parents pursuant to Section 17.06, denied the parents a hearing within ten (10) days after the signing of the Ex Parte Order; the Court refused to act on the Writ of Habeas Corpus, stating a lack of jurisdiction. The Court then transferred the case from Harris County to Montgomery, a different county. Section 11.06 of the Texas Family Code does permit transfers of such cases, however, the requirement that the motion be timely filed by a party other than Petitioner was not fulfilled.

(g) Further, that the Sims' First Amendment right to petition the Court for redress of grievances was denied. The State District Court's refusal to hear a motion for modification, a Writ of Habeas Corpus, and the Texas Court of Civil Appeals' refusal to hear a petition of Writ of Habeas Corpus presented to it also constituted irreparable injury.

2. Threatened Injury

Each and every one of the actual injuries stated above poses a threat of irreparable injury which is both great and immediate.

(a) The fact that an action is still pending allows child welfare officials to initiate an action to terminate the parental rights of the Sims as threatened by Rex Downing, social worker and employee of Child Welfare.

(b) In this case, just as in *Allee v. Medrano,* 416 U.S. 802 (1974), there is a great possibility that the conduct complained of could reoccur.

(c) The fundamental rights of the family unit and integrity is continually threatened by the possibility of removal, separation and denial of due process.

(d) The threat of amending the suits pending in State Court from those affecting the parent-child relationship, a petition to terminate parental rights as threatened by Harris County Welfare raises the threat of reoccurrance of the same due process injuries already suffered by the Sims.[3]

(e) The injury caused by the accumulation and dissemination of information by CANRIS poses a continuing threat of interference with fundamental rights of the family unity.

(f) The threat that the state would return to its practices of not appointing an attorney to represent the interest of the children would continue, thus constituting irreparable injury, as the state failed to appoint an attorney although permitted to do so by Chapter 11, Sections 11.10 and 11.11 of Title Two (2) of the Texas Family Code.[4]

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3. Rex Downing's statement that he would seek termination of parental rights as a part of the Montgomery County action—Sims, A. 78.

4. Section 11.10(c) states "the court may appoint an attorney for any party in a case which it deems representation necessary to protect the interest of the child who is the subject matter of the

(g) Appellants' conduct constitutes an unwarranted inhibition of the ability of the Sims to function as a family. *Dombrowski v. Pfister,* 380 U.S. 479 (1965), emphasized the importance of protecting fundamental rights. The deprivation of custody prior to the civil proceedings is an irreparable injury which is both great and immediate . . . and . . . will not be dissipated in the State proceeding, *Newton v. Burgin,* 363 Federal Supp. 782 (W.D.N.C.) (1973) aff'd. 414 U.S. 1139 (1974).

The manifest bad faith, the great, immediate and irreparable injuries as discussed herein constitute harassment.

3. The Statutes Involved

The provisions of the Texas Family Code relied upon by the State presents a statutory scheme which is unconstitutional.

The following Sections of the Texas Family Code were found to be unconstitutional as applied:

a) 11.11(a)(4), 34.05(a). The Federal District Court found the following: "That the use of Section 11.11(a)(4) in conjunction with Chapter 17, of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days, measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

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suit". Appellees maintain that the separate interest of the child is one of which representation is necessary.

Section 11.11 allows the court to "make any temporary order for the safety and welfare of the child." Appellees maintain that an appointment of an attorney to represent the child would be in the best interest, safety and welfare of the child.

The use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title Two (2) of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals, prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision."[5]

The above sections as applied denied Appellees their rights to notice, a hearing and service of process in that the State Court relied upon those sections when it issued the two (2) Ex Parte Orders. The family's fundamental rights which are guaranteed by the Fourteenth (14th) Amendment of the United States Constitution, applicable to the states through the Fifth Amendment, were denied, *Watson v. Buck,* 313 U.S. 387 (1941).

Further that the statutes as applied constitute an exception to the abstention doctrine because of:

(1) the confusion involved in this case,

(2) the procedural irregularities, and

(3) the absence of a fair opportunity for Appellees to fairly pursue their constitutional claims in an on-going state proceeding, *Younger v. Harris,* (supra), *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Judice v. Vail,* 430 U.S. 327 (1977); and *Gibson v. Berryhill,* 414 U.S. 564 (1963).

(b) The Federal District Court found the following in relationship to Sections 11.10, 11.15, 17.02, 17.03, 17.05, 34.05 and 34.08 of the Texas Family Code (1975).

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5. See article 12 A-102 and 103 of Appendix.

(1) "That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15 and 17 of Title 2 of the Texas Family Code in which the State is a party.

(2) That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15 and 17 of Title 2 of the Texas Family Code.

(3) That Section 17.02 is unconstitutional on its face insofar as it fails to require that the Ex Parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

(4) That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the Ex Parte hearing to be held immediately after possession of a child is taken by the State.

(5) That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

(6) That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the Ex Parte Order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

(7) That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid the investigation of the abuse or neglect before such an order is obtained.

(8) That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

(9) That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation, *Sims v. State Department Of Public Welfare,* 438 F. Supp. 1188 (1977), hereinafter referred to as *Sims.*

One of the functions of the state is to protect the family unit. Statutes, policies, and practices such as those above which permit unjustified interference with the family unit by the state have been found to be unconstitutional by this Court, *Stanley v. Illinois,* (supra); *Levy v. Louisiana* (supra); *Alsager v. Dist. Court of Polk County, Iowa,* 406 F. Supp. 10 (8th Cir. 1975); *Pierce v. Society of Sisters,* (supra); *Skinner v. Oklahoma,* 316 U.S. 35 (1942); *Prince v. Massachusetts,* (supra).

(c) Abstention would not be proper as the statutes under which the State prosecuted this cause are "flagrantly and patently violative of federal constitutional requirements." This cause is an exception to the abstention doctrine in that the statutes involved in this case were relied upon in bringing about an unwarranted intervention with fundamental rights, just as those involved in *Watson v. Buck,* (supra).

(d) This court held in *Huffman v. Pursue, Ltd.,* (supra) that abstention would not be proper where there were extraordinary circumstances which would justify federal intervention. Those circumstances are:

(1) a justification for early intervention,

(2) a finding that the state proceeding was conducted with an intent to harass or in bad faith, and

(3) a finding that the statutes challenged were flagrantly and patently unconstitutional.

The justification for early intervention in *Sims* is that there is no adequate remedy at state law, as Appellees' every effort, to obtain judicial relief in State court was either frustrated or denied. The State proceedings were conducted with intent to harass and in bad faith; further that the statutes were found to be flagrantly and patently unconstitutional, in that the requirements of the Due Process and Equal Protection Clauses of the Fourteenth (14th) Amendment of the United States Constitution were not met.

(e) The doctrine as put forth by this Court in *Railroad Commissions of Texas v. Pullman Co.,* 312 U.S.

496 (1941), does not apply. This Court held that abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a State Court determination of pertinent state law.

(f) This Court held in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), that abstention is appropriate in cases presenting difficult questions of state law bearing on policy problems of substantial public importance whose importance transcends the results in the case before the court. The instant case does not involve a complicated, administrative decision-making process.

(g) *Newton v. Burgin,* (supra) hereinafter, referred to as the *Newton Doctrine* or the *Newton Court,* involved an action for declaratory judgment that a child's seizure was unconstitutional and that a "five day" period under a statute providing that if the child appears to be in danger, subject to such serious neglect as may endanger his health or morals or the best interest of the child requires that the court assume immediate custody of the child prior to the hearing; a parent can be deprived of custody for at least five (5) days before a hearing is held unconstitutional. The Three-Judge Federal District Court, Gordon, Chief Judge, held that it would not be appropriate for such court to abstain from determining constitutionality in order to give state courts a chance to interpret the statute.

Whereas, the *Newton Court,* held that abstention was warranted in a case where a parent was deprived of her child for five (5) days pursuant to a state statute, the case at bar presents a situation where the parents were deprived of all three (3) of their children for a period

of forty-two (42) days without benefit of an adversary proceeding. Furthermore, the *Newton Court* found that the two-day (2) deprivation was sufficient to justify federal intervention.

The case at hand is an exception in that it was not barred by the anti-injunction provisions of 28 U.S.C. § 2283 (1948). This action was filed pursuant to 42 U.S.C. § 1983 which is not barred by 28 U.S.C. § 2283; further that 42 U.S.C. § 1983 is an exception to the *Younger doctrine.* In addition, 28 U.S.C. § 2283 (1948) was not repealed at the time the Sims action was filed.

II

THE ISSUES IN THE CASE AT HAND PRESENT A CASE OR CONTROVERSY.

This Court has declared that the federal courts are constrained by Article III of the United States Constitution to decide only cases between actual, adverse litigants, *Richard v. Ramirez,* 418 U.S. (1974); *O'Shea v. Littleton,* 414 U.S. 488 (1974); *Flast v. Cohen,* 392 U.S. 83 (1968). The doctrine of mootness is jurisdictional and arises in cases such as *Sims* where Plaintiffs' request injunctive or declaratory relief. It is well settled that an action for injunctive relief does not become moot merely because the conduct complained of has terminated; or if there is a possibility of reoccurrence, as otherwise the Appellants would always be free to return to their wrongful conduct, *Allee v. Medrano,* (supra).

The following are reasons why the case at bar presents a case or controversy:

(1) The unconstitutional application of the state statutes to the Sims family,

(2) The prosecution by the State wherein it relied upon statutes which were found to be not only flagrantly and patently violative of constitutional requirements but unconstitutional on their face,

(3) The denial of due process by the state as guaranteed by the Fourteenth (14th) Amendment of the United States Constitution, and

(4) The fact that the State failed to accord the Sims a hearing and denied them access to the Courts, and the practice of the state in failing to appoint an attorney to represent the separate interests of the children.

The Appellants did not cease their wrongful conduct until ordered to do so by the Federal District Court. Therefore, how can Appellants now assert that this case is moot. There is always a great possibility of reoccurrence of the same conduct and practices by the State, as actions are still pending in state court and Child Welfare's threat to pursue termination of the Sims' parental rights. Aggrieved persons in cases such as these would never be able to seek redress of grievances if the State is permitted to render a case moot by merely voluntarily returning a child or returning children when ordered to do so by a court.

In this case, just as the circumstances in *Roe v. Wade,* 410 U.S. 113, suits affecting the parent-child relationship instituted by the State seeking conservatorship (custody) or termination "provides a classic justification for a conclusion of non-mootness." It could truly be "capable of repetition yet evading review," *Southern Pacific Terminal Company v. I.C.C.,* 219 U.S. 498 (1910); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 1951 (1968); *DeFunis v. Odegaard,* 416 U.S. 312

(1974). Further that the great, immediate and irreparable injuries suffered by Appellees continue and are likely to reoccur unless this Court addresses the merits of the case.

The essential controversy, which is the great, immediate and irreparable injuries and the wrongful conduct as discussed herein is not moot but very much alive. *Gray v. Sanders,* 372 U.S. 368 (1963); *Walling v. Helmerich,* 323 U.S. 37, (1944) and *United States v. W. T. Grant,* 345 U.S. 629 (1953).

Another view of what constitutes justifiable controversy was set forth by this Court in *Roe v. Wade,* (supra), when this Court held that Ms. Roe, whose pregnancy had been terminated by the time that the case was heard on the merits, had standing to undertake the litigation, and that she presented a justifiable controversy. This Court also stated that the termination of her pregnancy did not render her cause moot.

Equitable relief was proper in this instance and the case at hand was not moot at the time of the hearing on the merits. As there was both an adequate showing of responsibility and causal connection between Appellants' contact and the injury alleged from the time that Appellants summarily seized the minor Appellees until relief was granted by the Federal District Court in its decision of October, 1977. This cause has not been rendered moot. The facts in this case just as those in *Roe v. Wade,* (supra), illustrate a classic example of non-mootness. A somewhat lesser exception was recognized in *Dyer v. Securities and Exchange Commissions,* 251 2d 512 (8th Cir. 1958), rev'd. 359 U.S. 499, in light of—266 F.2d 33 (8th Cir. 1959); the mootness

doctrine was viewed with slightly less strict standards; where the case involved the challenging of governmental actions, regulations, standards and statutes as in *Sims*. Further that the actions by Appellants, under color of law, against Appellees are evidence of a governmental custom and policy which seriously injures Appellees and deprives them of constitutional rights. *Rizzo v. Goode,* 423 U.S. 362 (1976), *Monroe v. Pape,* 365 U.S. 167 (1961) and *Monell v. Department of Social Services of the City of New York,* ____U.S.____, 46 L.W. 4569 (June 6, 1978). In *Sims* as in *Sosna v. State of Iowa,* 419 U.S. 393 (1975), there existed a case or controversy between the parties when the complaint was filed and the case still presents an actual and live controversy.

III

A. Due Process and Equal Protection

The Fourteenth Amendment of the United States Constitution guarantees citizens the right to due process of and equal protection before the law.

As defined by this Court and other judicial tribunals, due process under the Fourteenth Amendment of the United States Constitution is affording individuals a meaningful opportunity to be heard at critical stages in proceedings involving the deprivation of privileges, liberties, immunities and fundamental rights. Equal protection embodies the notion of providing individuals equal justice before the law.

The parent-child relationship, that is, the right of family unity, relationship, integrity, due process, equal protection, privacy and mutual association clearly falls within those rights that have been deemed essential and basic

rights far more precious than property rights, therefore protected by the Ninth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment (14th) of the United States Constitution. Therefore, the parent-child relationship is not subject to unwarranted State intrusion. By way of illustration but not limitation, the following is an overview of case law:

In *Meyer v. Nebraska,* (supra), this Supreme Court found the right of parents to have their children study the German Language was a protected First Amendment right, stating, at P. 399:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also . . . the right . . . to marry, establish a home and bring up children . . ." [emphasis added.]

In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), this Court stated that the right to educate one's children as one chooses was made applicable to the States by force of the First and Fourteenth Amendments, and the Court stated:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . the child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . [and] duty to recognize and prepare him. . . ."

In *Skinner v. Oklahoma,* 316 U.S. 35 (1942), this Court recognized the rights to marry and procreate as "basic civil rights of man," and struck down a state statute authorizing sterilization of habitual criminals.

In 1943, faced with a situation of State intervention as *parens patriae* involving the welfare of children in *Prince v. Massachusetts,* 231 U.S. 158 (1943), the Supreme Court held:

> "It is cardinal with us that the custody, care and nuture of the child reside first in the parents whose primary function and freedom include preparation for obligations the State can neither supply nor hinder * * * and it is the recognition of this that these decisions (*Meyer* and *Pierce*) have respected the private realm of family life which the state cannot enter."

May v. Anderson, 345 U.S. 528 (1953), held a parent's "immediate right to the care, custody, management and companionship of . . . minor children" to be "one of the most precious of personal liberties."

Stanley v. Illinois, 405 U.S. 645 (1972), struck down an Illinois dependency and neglect statute which deprived unmarried fathers of the care and custody of their natural children upon death of their mothers, holding that the right of parents to have custody and management of their children is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the Ninth Amendment.

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man', and 'rights far more

> precious than property rights.' It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." [Citation omitted.] 345 U.S. 528 (1953).

Roe v. Conn., 417 F.Supp. 769 (M.D. Ala.) (decided July 6, 1976) cites and follows *Alsager v. District Court of Polk County, Iowa,* 406 F.Supp. 10, (8th Cir. 1975), and is the most recent decision known to Appellees dealing with the fundamental freedoms of the parent-child relationship:

> "A district court in Iowa recently reviewed the long line of Supreme Court cases addressed to the constitutional interests at stake where various aspects of family life are threatened and concluded there is a fundamental right to family integrity protected by the Fourteenth Amendment to the United States Constitution." *Alsager v. District Court of Polk County, (supra)*

A more recent Supreme Court decision, *Cleveland Board of Education v. LaFleur,* 416 U.S. 791 (1974), reaffirms the constitutional nature of this interest: 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' In addition to the 'liberty' concept of the Fourteenth Amendment, the Supreme Court has been equally solicitous of the family enclave under the doctrine of privacy. See *Griswold v. Connecticut,* 380 U.S. 1678 (1965); *Eisenstadt v. Baird,* 405 U.S. 438, (1972), *Roe v. Wade, (supra).*

Furthermore, Appellees acknowledge that the state has a legitimate interest in protecting children.

Courts must decide on a case by case basis what constitutes due process, and in the instant case, due process becomes a balancing of the foregoing competing interests: The interests of the children, the parents and the state.

The Equal Protection Clause of the Fourteenth Amendment (14) as interpreted by this Court dictates that the interests of the child, parent, and state come before it on equal footing in terms of adequate notice, right to counsel and standard of proof, *In Re: Gault,* 387 U.S. 1 (1967), *Levy v. Louisiana* (*supra*) and *Stanley v. Illinois* (*supra*).

This Court has been equally solicitous and protective of the family unit under the doctrine of privacy, *Stanley v. Illinois,* (*supra*); *Griswold v. Connecticut,* (*supra*); *Eisenstadt v. Baird,* (*supra*); and *Roe v. Wade,* (*supra*).

B. Due Process, Equal Protection And The Ninth Amendment As Applied In The Instant Case.

Whereas the law protects the rights of individuals to their property and benefits, the Texas statutes in question fail to protect the rights of the family, the child and the parent, for example, this Court held that recipients were entitled to a hearing prior to termination of welfare benefits in *Goldberg v. Kelly,* 397 U.S. 254 (1970); further that in *Bell v. Benson,* 402 U.S. 535, (1971), this Court required a hearing and inquiry into the potential liability of a license holder prior to suspension of drivers licenses under provisions of a State Safety Responsibility Act. This Court has held that an individual's parole may

not be revoked without a hearing conducted before an impartial body as soon as possible after the alleged violation, *Morrissey v. Brewer,* 408 U.S. 471, (1972).

The Court has recognized the importance of according individual a hearing as in *Goss v. Lopez,* 419 U.S. 565 (1975). This Court held that students suspended from school under authority of a state statute permitting suspensions for misconduct for one to ten days had a property interest protected by the Due Process Clause which required notice of the charges and an opportunity to reply before or as soon as practicable after expulsion.

The decision rendered in *Fuentes v. Shevin,* 407 U.S. 67 (1972), struck down the Florida and Pennsylvania replevin statutes as unconstitutional because they permitted a deprivation of property without due process of law in that the statutes involved denied the Plaintiffs a hearing prior to seizure of their chattel.

Appellees respectfully maintains that this Honorable Court should afford parents and children as much consideration as given Ms. Fuentes and her stove as well as a situation involving an individual's suspension from school, revocation of parole, suspension of drivers licenses and termination of welfare benefits.

Appellees respectfully submit that Sections 11.10, 11.15, 17.02, 17.03, 17.05, 17.06, 34.05(c) and 34.08 are unconstitutional on their face, further that sections 11.11 (a)(4) when used in conjunction with Chapter 17 and section 34.06 are unconstitutional.

Section 11.10. This provision deals with the appointment of a guardian ad litem. As stated herein, due process among other things, constitutes a meaningful op-

portunity to be heard. This Court has declared that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," *Powell v. Alabama,* 287 U.S. 45 (1932). Furthermore this Court has recognized the need for protection of the separate interests and rights of minors from the beginning of a legal proceeding. Section 11.10 on its face does not accommodate the possible and natural conflict between interests of child, parent and state and therefore denies due process in that it does not mandate the appointment of an attorney to represent the interest of the child. The lack of such a requirement effectively denies the child a meaningful opportunity to be heard and denies him equal justice before the law.

Section 11.15 presently provides that the standard of proof in suits affecting the parent-child relationship shall be a preponderance of the evidence. In other words, a mere finding of a preponderance of the evidence is the standard of proof relied upon for everything from temporary deprivation, all the way to termination of parental rights. Any intrusion by the State in the parent-child relationship involving the fundamental rights discussed above should at the very least require a standard of clear and convincing evidence. There is authority for the proposition that the standard be clear and convincing evidence. Those authorities are found below:

While the case at hand is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, the Sims like young Samuel Winship "have an interest of transcending value" at stake, *In Re: Winship,* 397 U.S. 358 (1970). The Iowa court held that the fundamental and essential right to family integrity requires, at the

very least, that the State notify parents of the allegations and prove its case by clear and convincing evidence, *Alsager v. District Court of Polk County, Iowa,* (supra). As summarized in the earlier discussion of family integrity, the right of a familial relationship and protection of that relationship is fundamental, *Alsager v. District Court of Polk County, Iowa* (supra); *Roe v. Connecticut* (supra); *Stanley v. Illinois,* (supra); *Prince v. Massachusetts,* (supra); *Pierce v. Society of Sisters,* (supra); *Meyer v. Nebraska,* (supra); *May v. Anderson,* (supra); *Levy v. Louisiana,* (supra) 1509 (1968); *Golona v. American Guaranty and Liability Insurance Co.,* (supra). The fundamental rights involved in termination cases and suits affecting parent-child relationships are equal to and of the same import as rights of juveniles involved in *In Re: Gault* (supra); *In Re: Kelly,* 262 N.W.2d 781, (Iowa, S. Ct., 1978); the Iowa Supreme Court held that the trial court was proper in applying the standard of clear and convincing evidence as a standard of proof. *In the Interest of Eric Hambelton,* 574 P.2d 982, (Court of Appeals of Kansas) (1968), the court held that a parent could not be deprived of her children unless the standard of proof was clear and convincing evidence. Clear and convincing evidence was held to be the standard of proof in *The Matter of the Guardianship of R.G. & F.,* 382 A.2d 654. (N.J. S.Ct.) (1977).

In *In Re: William L.,* 383 A.2d 1228, (Penn. S. Ct.) (1978), the Court stated that, "an ongoing relationship in the home will not be disturbed except upon a showing by clear and convincing evidence and that removal is clearly necessary."

Clear and convincing evidence was also found to be the proper standard of proof *In The Interest of Gray,*

353 So. 2d 393, (La. App.) (1977), and *In The Interest Of Gates,* 373 N.E. 2d 568, (Ill. 1978). The cases cited above show, that once a right has been deemed to be "fundamental," due process would demand at the very least, a standard of proof consisting of clear and convincing evidence. The retention of a preponderance of the evidence as the standard of proof rather than requiring that a showing be made by clear and convincing evidence in suits to terminate or affect parental rights where the State is the moving party, would constitute a denial of due process as required by the 14th Amendment of the United States Constitution.

Section 17.02. Presently provides that a petition should be filed immediately after a child is taken into possession and delivered to the Court. This provision is not to be relied upon if the child is taken into custody pursuant to Section 11.11.

This section 17.02 provides that, unless the welfare, law, or juvenile officer is acting pursuant to Section 11.11, the officer shall immediately file a petition upon delivery of the child to the Court. The Court then shall conduct a hearing to provide for the temporary care and protection of the child.

The Sims children were not delivered to the Court pursuant to Child Welfare's usual practice of not actually delivering children to the Court. The statute denies the parties due process in that it does not require that the hearing itself be held immediately. Since the Sims children were already in the possession of Harris County Child Welfare, there was no reason for the Court not to provide the parties with an immediate hearing. In fact, the statute does not even mention within what time period a hearing

should be conducted, therefore it is arbitrary and capricious thus constituting a denial of due process. This section also violates the Equal Protection Clause of the Fourteenth (14th) Amendment as it assumes that children who are taken into possession are in need of temporary care and protection without a judicial determination.

17.03 This section provides that a hearing may be held pursuant to section 17.02 without notice to the parents. This section constitutes a flagrant denial of due process in that it deprives children and parents of fundamental rights. Minimal due process requires notice to the parents that the children have been summarily seized, that an action has been instituted and notice of the grounds for seizure of the children. The foregoing also constitutes a denial of equal protection for children and their parents in that they once again are not on equal footing before the Court with the State and all its resources.

Section 17.05. This section provides that an Ex Parte Order issued pursuant to Section 17.04 expires at the end of the ten (10) day period following the date of such order or upon restoration of the child to the parents or upon the issuance of ex parte temporary orders. This section further provides that a court can direct child welfare to file a suit affecting parent-child relationship, in the event that possession is not restored to the parents. In the instant case, the State District Court failed to restore possession to the parents and did not provide an adversary hearing. The Court instead issued a second ten (10) day Ex Parte Order thus prolonging the deprivation. The Court's actions were violative of the Sims family rights guaranteed by both the Due Process and Equal Protection Clauses of the

Fourteenth Amendment (14th), in that the state stacked the Ex Parte Orders, effectively intruding upon the family unit for at least twenty (20) days without providing the family with any hearing.

Section 17.06. This section provides that the Court shall conduct a hearing upon motion of a parent whose rights were affected in a prior emergency order. The Court may, after a hearing, modify its earlier order if it finds that modification of the ex parte order is in the best interest of the child. This section violates the Sims' right to due process and equal protection in that it places an unfair burden upon the parents to come forth and show cause why the ex parte order should not continue in full force and effect when constitutionally the burden is upon the State to justify any deprivation. In this case the Sims were not even given an opportunity to file their motion and have a hearing pursuant to this section.

Section 34.05(c). This subsection provides that the Welfare investigation conducted after referral pursuant to section 34.01 and 34.05 shall include a home visit, a physical and psychological or psychiatric examination of all the children in the home, and an interview with the subject child. If parents deny child welfare permission to conduct the foregoing, the agency may then request the court, upon cause shown, to order the parents to allow access to conduct an investigation. This section violates the Sims' rights as guaranteed by the Ninth and Fourteenth Amendments of the United States Constitution.

The Sims' Ninth (9th) Amendment right to privacy was violated as Child Welfare was not only permitted to conduct its investigation but could also obtain a

court order directing such unbridled intrusion without consent and any type of hearing. Due process and equal protection was once again denied the Sims in that Child Welfare conducted its investigation without notice and a hearing. Appellees maintain that the Constitution mandates that due process and equal protection extend to this type of investigation conducted by the State.

Section 34.08. This section provides that all reports, records, documents and any other information compiled in an investigation by Child Welfare are confidential and may only be disclosed pursuant to agency regulations.[6]

The investigation is an adversary proceeding as information gathered is relied upon in removing children from the home. Appellees acknowledge the importance of investigating reports of abuse, however, there is no justification for the States' denying individuals access to the results of the investigation. Due process requires that parties be apprised of the grounds that an action is initiated upon, further that equal protection and those rights guaranteed under the Sixth (6th) Amendment of the United States Constitution require access to the results of the investigation.

The Three-Judge District Court found that Sections 11.11(a)(4), used in conjunction with Chapter 17 of Title Two of the Texas Family Code and 34.06 are unconstitutional as applied. 11.11(a)(4). This sub-section provides that a Court may issue any temporary orders

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6. § 34.08
Confidentiality
The reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency. Added by Acts 1975, 64th Leg., p. 1272, ch. 476 § eff. Sept. 1975.

in suits affecting the parent-child relationship for the protection of the child, including the Court's taking the child into possession or giving possession to a court designated individual. Chapter 17 which is discussed above was relied upon in conjunction with 11.11(a)(4) by the State Court in the case at hand. The foregoing conjunctive application of those sections in the instant case, where the state court stacked the Ex Parte Orders, infringed upon the Sims Family's reciprocal fundamental rights to privacy, a familial relationship, integrity, and mutual association without providing any hearing. In fact, the state court through its actions initiated a proceeding which ultimately resulted in a forty-two (42) day separation of the Sims family.

Section 34.06. This provision authorizes the establishment by the Texas Department of Human Resources of a central registry for the collection and dissemination of information and referrals concerning child abuse and neglect. This registry known as CANRIS unconstitutionally invaded the privacy of the Sims family in that information gathered was disseminated without the consent of the family. CANRIS as applied in the instant case also has violated the Sims' rights to due process and equal protection as they were labeled as child abusers without benefit of a judicial determination. In other words, CANRIS, as applied, assumes that any one who is referred or reported is automatically a child abuser by the very fact that a referral was made.

The Sims family maintains that the action taken against them by Appellants was unjustified and that their only adequate remedy at law was to petition the Federal District Court for redress of the profound grievances which they suffered.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Three-Judge District Court as to proper jurisdiction and the holding on the merits of Appellees' cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Appellee's Brief on the Merits have on this the 12th day of January, 1979, been sent by United States Postal Service, Certified, Return Receipt Requested, to the following at P. O. Box 12548, Capital Station, Austin, Texas, 78711.

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